

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

004 IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,030

PAUL DE LUCIA,

Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 10 1967

Nathan J. Paulson
CLERK

JACK WASSERMAN
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Washington, D. C.

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(i)

STATEMENT OF QUESTIONS PRESENTED

1. Whether determinations made by a District Director of the Immigration and Naturalization Service on June 20, 1964 (prior to the final order of deportation herein) and thereafter, not in the deportation hearing conducted under 8 U.S.C. 1252(b), are controlled by 8 U.S.C. 1105a(a), and are initially reviewable exclusively in a Court of Appeals.

2. Whether the District Court lacks jurisdiction to review administrative determinations by the District Director of the Immigration and Naturalization Service at Chicago that appellant is an Italian citizen.

3. Whether administrative decisions of the District Director of the Immigration and Naturalization Service at Chicago, decisions of an official who lacks power to enter orders of deportation, are considered final orders of deportation initially reviewable exclusively in the Court of Appeals.

4. Whether summary judgment should have been granted to appellant, declaring that he is not an Italian citizen but stateless.

(iii)

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No. 21,030

PAUL DE LUCIA,
Appellant.

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Appellee.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order dismissing the action herein for lack of jurisdiction (J.A. 25). The order was entered by the District Court on April 21, 1967. Jurisdiction of the District Court was invoked under the Declaratory Judgment Act (28 U.S.C. 2201) and under the Administrative Proce-

dure Act (5 U.S.C. 1009).¹ This Court has jurisdiction of this appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant, Paul De Lucia, is a 69-year-old native of Italy who came to the United States illegally and without proper documents in 1920. He was naturalized as an American citizen in 1928 (Complaint, J.A.). In 1957 he was denaturalized, *United States v. De Lucia*, 256 F.2d 487 (7th Cir., 1958), cert. denied, 358 U.S. 836. In 1959 he was ordered deported, *De Lucia v. Flagg*, 297 F.2d 58 (7th Cir., 1961), cert. denied, 369 U.S. 837.

Thereafter, his deportation proceeding was reopened and he was again ordered deported by decision of the Board of Immigration Appeals dated April 21, 1966. This decision was upheld on review, *De Lucia v. Immigration and Naturalization Service*, 370 F.2d 305 (7th Cir., 1966), cert. denied, 386 U.S. 916.²

In the deportation proceedings conducted under Section 242(b) of the Immigration and Nationality Act [8 U.S.C. 1252(b)] no finding was made as to appellant's citizenship (J.A. 19). The judicial review action likewise left the issue of appellant's present citizenship or statelessness open (J.A. 20).

However, *ex parte and apart from the deportation proceeding conducted under 8 U.S.C. 1252(b)*, the Immigration Service had incorrectly and improperly determined that De

¹ Recodified by Public Law 89-554, 80 Stat. 378, 392, as 5 U.S.C. 706

² The Seventh Circuit distinguished between the order of deportation and its execution, stating "we are here concerned only with the validity of the deportation order and not with its execution", 370 F.2d 305 at 309.

Lucia was a citizen of Italy. On June 20, 1964, the Immigration and Naturalization Service advised the Italian authorities (J.A. 16) on printed Immigration and Naturalization Form I-217, Item 4 (J.A. 15) that De Lucia's citizenship was "Italian". Again on April 21, 1966, the same day that the appellant was finally ordered deported by the Board of Immigration Appeals (J.A. 20), the appellee, through his agents, advised the Consul of the United Kingdom in Chicago that appellant's present nationality was Italian (J.A. 23). Appellant had designated England, pursuant to 8 U.S.C. 1253 as his choice of a place of deportation (J.A. 7).³

This litigation was instituted on February 23, 1967 (J.A. 1). Six days later, on March 1, 1967, appellee advised the United Kingdom that appellant "claims statelessness" (J.A. 14). At no time has appellee acknowledged that appellant has lost his Italian citizenship or that he is stateless. No attempt has been made to correct the incorrect assertion by appellee to the Italian authorities that appellant is an Italian citizen.⁴

³The failure of the appellee to supply the country designated by appellant with true, full or complete information deprives him of his rights under the deportation statute and vitiates the subsequent designation by the Attorney General of a place of deportation. *United States ex rel. Scala Di Felice v. Shaughnessy*, 114 F. Supp. 791 (S.D. N.Y., 1953).

⁴Prior to the institution of this litigation, and on April 27, 1966, the Italian travel document issued on June 29, 1964, and in the possession of appellee, was ordered suspended in Rome by the Italian Jurisdictional State Council.

Subsequent to the institution of this litigation and on March 20, 1967, the Civil Tribunal of Rome, First Section, decided that appellant is not an Italian citizen.

It is obvious from the foregoing that appellee cannot assert here its stereotype and familiar claim that this lawsuit is for the purpose of delay.

The lawsuit was filed on February 23, 1967, seeking declarations that appellant is not a citizen of Italy and that the *ex parte* determinations of appellee as to appellant's Italian citizenship were illegal and improper. Request was made for injunctive relief restraining appellee from representing that appellant is an Italian citizen (J.A. 3).

Appellee contended in the District Court that "at no time has defendant made a determination that plaintiff is a national or citizen of Italy". Appellee further stated that "In seeking travel documents from Italy, at earlier stages of the proceeding, defendant expressed the opinion that plaintiff was a citizen of Italy, which represented his opinion and belief." It was further represented by appellee that in future dealings with Italy it would be stated that appellant claims statelessness (J.A. 11, par. 19).

Appellant moved in the District Court for injunctive relief and summary judgment (J.A. 1). Upon the basis of *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1963), and *Attorney General v. Bufalino*, ___ App. D.C. ___, 371 F.2d 738 (1966), appellee moved to dismiss the complaint for lack of jurisdiction (J.A. 5). In the alternative, summary judgment was sought by a cross-motion (J.A. 5). The motion to dismiss for lack of jurisdiction was granted (J.A. 25) and this appeal followed.

STATUTES AND REGULATIONS INVOLVED

Section 106(a) of the Immigration and Nationality Act [8 U.S.C. 1105a(a)] provides in part:

"The procedure prescribed by and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031, et seq.) shall apply to and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior Act * * *."

Section 242(b) of the Immigration and Nationality Act [8 U.S.C. 1252(b)] provides in part:

"A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien * * *."

8 C.F.R. 242.20 (1965 Supp.) provides:

"The order of the special inquiry officer shall be final except when the case is certified to the Board as provided in Part 3 of this chapter, or an appeal is taken to the Board by the respondent or the trial attorney."

STATEMENT OF POINTS

1. The District Court erred in dismissing the action for lack of jurisdiction.
2. Appellant's motion for a preliminary injunction and for summary judgment should have been granted.

SUMMARY OF ARGUMENT

The determinations and assertions by appellee on June 20, 1964 (J.A. 16), and on April 21, 1966 (J.A. 23), both before and at the time of the final order of deportation herein, that appellant is an Italian citizen were not "final orders of deportation * * * pursuant to administrative proceedings under Section 242(b) [8 U.S.C. 1252(b)]" and exclusive initial jurisdiction was not vested in the Court of Appeals to review such determinations. *Mui v. Esperdy*, 371 F.2d 772, 776-7 (2nd Cir., 1966), cert. denied, 386 U.S. ___; *Mendez v. Major*, 340 F.2d 128 (8th Cir., 1965); *Salama v. Immigration and Naturalization Service*, 336 F.2d 7 (5th Cir., 1964). As the determination as to appellant's Italian citizenship was not made in the administrative deportation proceeding conducted under 8 U.S.C. 1252(b), but in an *ex parte* manner apart from such proceeding, it was error to dismiss the action upon the authority of *Foti v. Immigration and Natu-*

ralization Service, 375 U.S. 217 (1964), and *Attorney General v. Bufalino*, ___ App. D.C. ___, 371 F.2d 738 (1966). It is clear that appellant is not a citizen of Italy and his motion for summary judgment should have been granted.

ARGUMENT

I

It Was Error To Dismiss the Complaint for Lack of Jurisdiction

In the administrative deportation proceedings conducted herein pursuant to 8 U.S.C. 1252(b), no finding was made that appellant was a national of Italy (J.A. 20). Entirely apart from such proceedings, appellee erroneously determined and asserted in communications to Italy on June 20, 1964 (J.A. 16), and to England on April 21, 1966 (J.A. 23), that appellant was and is a citizen of Italy. Such determination is not initially reviewable exclusively in the Court of Appeals.

Mui v. Esperdy, 371 F.2d 772 (2nd Cir., 1966), cert. denied, 386 U.S. ___, involved applications for adjustment of status as permanent residents made by aliens claiming to be refugees. These applications were made subsequent to deportation orders but not in administrative deportation proceedings conducted under 8 U.S.C. 1252(b). The Second Circuit said (371 F.2d 776-7):

"Jurisdiction of the district court is in no way foreclosed by the construction given the statute in *Foti v. Immigration and Naturalization Service*, 375 U.S. 217. * * * The Supreme Court there decided that the statutory language covered 'a denial of discretionary relief made during the same proceedings in which deportability is determined, which effectively terminates the proceeding * * *' * * *.

"The Supreme Court's decisions do not demand or even justify our recasting § 106(a) so as to give the courts of appeals exclusive jurisdiction over all orders made by immigration officers which might af-

fect the deportation of aliens, subject only to the recognized exception for habeas corpus; if Congress had wanted to go that far, presumably, it would have known how to say so."

Salama v. Immigration and Naturalization Service, 336 F.2d 7, 13 (5th Cir., 1964), declares that:

"Even under the liberal interpretation called for by *Foti*, it is difficult to see how Section 106(a) can be expanded to include a denial by the District Director of an application for a waiver under Section 212(e) which occurred prior to the institution of deportation proceedings."

See also: *Mendez v. Major*, 340 F.2d 128 (8th Cir., 1965).

Unlike *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1963), and *Attorney General v. Bufalino*, ___ App. D.C. ___, 371 F.2d 738 (1966), review is not sought here of a determination made in the deportation proceeding conducted under 8 U.S.C. 1252(b). Such determinations are made either by a Special Inquiry Officer (8 C.F.R. 242) or by the Board of Immigration Appeals. Here, the determination of Italian citizenship was made by the Chicago District Director of the Immigration and Naturalization Service who lacks power to enter an order of deportation. It was not made in the deportation proceeding conducted under 8 U.S.C. 1252(b). Section 106(a), 8 U.S.C. 1105a(a) confines exclusive initial judicial review to the Court of Appeals only in cases of "final orders of deportation * * * pursuant to administrative proceedings under Section 242(b) [8 U.S.C. 1252(b)]". The administrative determinations herein were of Italian citizenship. They were not final orders of deportation. They were not made pursuant to administrative proceedings under 8 U.S.C. 1252(b). The District Court had jurisdiction and its dismissal of the complaint here was erroneous.

II

**Appellant Is Not a Citizen of Italy. His Motion for
Summary Judgment Should Have Been Granted**

Appellant lost his Italian citizenship when he became a naturalized American in 1928. He did not regain it upon denaturalization (J.A. 4, 22). On March 20, 1967, the Italian courts ruled that he is no longer an Italian citizen. Appellant's motion for summary judgment should have been granted.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

JACK WASSERMAN
DAVID CARLINER

902 Warner Building
Washington, D. C.

Attorneys for Appellant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL DE LUCIA
1515 Bonnie Brae
River Forest, Illinois

Plaintiff

v.

ATTORNEY GENERAL
OF THE UNITED STATES

Defendant

Civil Action No. 422-67

DOCKET ENTRIES

April 11, 1967—Motion for Preliminary Injunction argued and denied. Motion to Dismiss or in the Alternative for Summary Judgment argued and to dismiss granted. (Rep. Ida Watson) McGarraghy, J.

February 23, 1967—Complaint filed.

February 23, 1967—Motion for Preliminary Injunction filed.

March 6, 1967—Defendant's Motion to Dismiss or in Alternative for Summary Judgment; and Opposition to Motion for Preliminary Injunction filed.

March 20, 1967—Opposition to Defendant's Motions to Dismiss and for Summary Judgment. Cross Motion of Plaintiff for Summary Judgment filed.

March 20, 1967—Plaintiff's Statement of Material Facts as to Which there is no Genuine Issue Pursuant to Rule 9(h) filed.

April 21, 1967—Order filed. Joseph C. McGarraghy

May 1, 1967—Notice of Appeal. filed.

COMPLAINT
(Action for Declaratory Judgment)
[Filed February 23, 1967]

The plaintiff, Paul De Lucia, respectfully alleges:

1. This is an action for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) for review under 28 U.S.C. 1361, and for review under the Administrative Procedure Act (5 U.S.C. 1009).
2. The plaintiff was born in Italy in 1897, came to the United States in 1920 and has been here ever since.
3. The defendant is the Attorney General of the United States and is charged with the statutory duty to enforce the immigration and deportation laws of the United States and to determine the citizenship of aliens within the United States.
4. In 1928 plaintiff was naturalized as an American citizen.
5. Upon plaintiff's naturalization as an American citizen, he lost his Italian citizenship under Italian law.
6. In 1957 plaintiff was denaturalized and deprived of his American citizenship.
7. Upon plaintiff's denaturalization he did not regain his Italian citizenship but became stateless.
8. Defendant, through his agents, has made an *ex parte* determination that plaintiff is presently a citizen of Italy.
9. Defendant, through his agents, has represented to officials of the Government of England that plaintiff is a citizen of Italy.
10. Defendant, through his agents, has represented to officials of the Government of Italy that plaintiff is a citizen of Italy.
11. The aforesaid representations that plaintiff is a citizen of Italy are false and untrue.

12. The defendant, through his agents, is seeking to deport plaintiff and has secured a refusal by England to accept plaintiff as a deportee upon the representation that plaintiff is a citizen of Italy.

13. Plaintiff's deportation has been directed to England and upon England's refusal, deportation is to be effectuated to Italy.

14. Defendant's *ex parte* determination that plaintiff is a citizen of Italy is without legal or factual foundation, is improper and illegal and is causing plaintiff irreparable damage.

WHEREFORE, Plaintiff prays for a judgment:

(a) Declaring that plaintiff is not a citizen of Italy and is stateless.

(b) Declaring that defendant's *ex parte* ruling that plaintiff is an Italian citizen is null and void.

(c) Restraining defendant and his agents from representing that plaintiff is a citizen of Italy.

(d) For such other and further relief as may be appropriate.

JACK WASSERMAN
DAVID CARLINER
902 Warner Building
Washington, D. C.
Attorneys for Plaintiff

MOTION FOR PRELIMINARY INJUNCTION

[Filed February 23, 1967]

Comes now the plaintiff and upon the complaint and attached affidavit moves the Court for a preliminary injunction restraining defendant from representing that plaintiff is a citizen of Italy pending determination of this suit and until further order of the Court and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN
DAVID CARLINER
902 Warner Building
Washington, D. C.
Attorneys for Plaintiff

AFFIDAVIT

[Filed February 23, 1967]

CITY OF WASHINGTON
DISTRICT OF COLUMBIA SS:

JACK WASSERMAN, being duly sworn on oath according to law, deposes and says:

1. I am plaintiff's attorney in the above entitled action.
2. Defendant, through his subordinates, has ordered plaintiff deported and is seeking to deport him to Italy.
3. Plaintiff designated England as his first choice as a place of deportation.
4. Defendant, through his subordinates, represented to officials of the United Kingdom in Chicago on or about April 21, 1966, that plaintiff is and was a citizen of Italy.
5. I have examined the Italian nationality laws and secured the opinions of Italian lawyers expert in Italian citizenship matters. It is clear that plaintiff lost his Italian citizenship in 1928 and never regained the same. He is now stateless.

6. The determination and representation on April 21, 1966, that plaintiff is or was an Italian citizen has no legal or factual basis.

7. The attempt to deport plaintiff to Italy is illegal and contrary to law and is causing plaintiff irreparable injury.

JACK WASSERMAN

Subscribed and sworn to
before me this 23 day of
February, 1967.

Hilda Kalesh-alc
NOTARY PUBLIC

**DEFENDANT'S MOTION TO DISMISS, OR,
IN ALTERNATIVE, FOR SUMMARY JUDGMENT:
AND OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**
[Filed March 6, 1967]

Comes now defendant, by his undersigned attorneys, and moves the Court to dismiss or, in the alternative, for summary judgment. Defendant also hereby opposes plaintiff's motion for preliminary injunction.

Incorporated herein and made a part hereof are the following Government Exhibits (identified as indicated):

Government

<u>Exhibit No.</u>	<u>Description</u>
1	Affidavit of Charles Gordon, General Counsel, Immigration and Naturalization Service, dated March 7, 1967
2	Letter from Immigration and Naturalization Service to Consul General of Great Britain, dated March 1, 1967

- 3 Information Form and reply from Vice Consul of Great Britain to Immigration and Naturalization Service, dated March 1, 1967
- 4 Information for travel document or passport, dated June 20, 1964

In support hereof, defendant submits a Statement of Material Facts and Memorandum of Points and Authorities.

DAVID G. BRESS
United States Attorney
JOSEPH M. HANNON
Assistant United States Attorney
GIL ZIMMERMAN
Assistant United States Attorney

Of Counsel:

CHARLES GORDON
General Counsel
Immigration and Naturalization Service

Government Exhibit 1

AFFIDAVIT
[Filed March 6, 1967]

CITY OF WASHINGTON
DISTRICT OF COLUMBIA SS:

CHARLES GORDON, being duly sworn, deposes and says:

1. I am the General Counsel of the Immigration and Naturalization Service.

2. According to the records of the Service plaintiff was born in Italy in 1897 and lived in Italy until 1920. In 1917 he was convicted of voluntary homicide in Italy and after his release from prison was alleged to have killed a second person. Fleeing prosecution in Italy plaintiff came to the United States in 1920. He entered under a false

passport, representing himself as Paolo Maglio, under which name he sought and obtained naturalization in 1928.

3. The records of the Service show that in 1956, after investigation had revealed plaintiff's entry under a false name and his homicide conviction, denaturalization proceedings were instituted. They resulted in the revocation of his citizenship. *United States v. De Lucia*, 256 F.2d 487 (C.A. 7), certiorari denied, 358 U.S. 836. Plaintiff was subsequently ordered deported (to Italy) on the grounds that he had entered with fraudulent documents under an assumed name, and that he had been convicted of voluntary homicide prior to such entry. The deportation order was upheld on judicial review. *De Lucia v. Flagg*, 297 F.2d 58 (C.A. 7), certiorari denied, 369 U.S. 837.

4. The deportation order could not be executed between 1962 and 1964 because of inability to obtain a travel document for plaintiff. However, in June 1964 a passport was issued by the Italian Government and plaintiff was notified to report for deportation on July 4, 1964. On July 1, 1964, he unsuccessfully moved to reopen the deportation proceedings. He then brought a habeas corpus proceeding, which the district court dismissed. During the pendency of an appeal from that decision, the parties, with the approval of the court, entered into a stipulation for remand to the administrative authorities solely for the purpose of enabling plaintiff to seek any discretionary relief to which he thought himself entitled and to have the special inquiry officer designate the country to which deportation would be effected.

5. The administrative proceedings were reopened for this purpose and extensive hearings were conducted. During the hearings the plaintiff designated England as the place to which he desired deportation and the special inquiry officer stated that he would direct deportation to that country and, alternatively, to Italy. Plaintiff did not then object to the designation of Italy, but asked that his deportation to that country be withheld on a claim that it would subject him to persecution. After conclusion of the reopened hearings,

the special inquiry officer on October 25, 1965, denied the applications for discretionary relief and reinstated the deportation order, directing plaintiff's deportation to England, the country designated by him, and alternatively, to Italy, if England was unwilling to accept him. In his decision the special inquiry officer made no finding that plaintiff was a national of Italy, merely reciting his birth in Italy and his claim that he was now stateless.

6. Plaintiff then filed a notice of appeal to the Board of Immigration Appeals contending, *inter alia*, that the order of deportation to Italy was illegal. In his brief supporting the appeal plaintiff argued that he had lost his Italian citizenship when naturalized in the United States and complained that: "The basis for deportation to Italy is not disclosed by the record."

7. In its brief opposing the appeal the Government pointed out that plaintiff had not contested the propriety of designating Italy as the place for his deportation. Moreover, the Government's brief stated:

"It is not true that the record does not disclose the basis for deportation to Italy. Respondent, who now claims to be stateless, was born in Italy. Under section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a) this acknowledged circumstance is in itself sufficient basis for ordering his deportation to Italy."

8. On April 21, 1966, the Board of Immigration Appeals affirmed the deportation order and dismissed the appeal. In its decision the Board discussed the provisions of section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), and of 8 C.F.R. 242.17(c) for designating the country of deportation. It rejected plaintiff's contention that the designation of Italy as the country of deportation was illegal, pointed out that the special inquiry officer had found plaintiff to be a "native of Italy, who claims he is now stateless" and concluded that: "The special inquiry officer's order complies fully with the procedural pattern

spelled out by the statute and the regulations."

9. Plaintiff then filed a petition for judicial review on April 22, 1966, in the United States Court of Appeals for the Seventh Circuit. His petition contained the following allegations:

"11. Petitioner is presently stateless, having lost his Italian nationality when he was naturalized as an American citizen in 1928. He did not regain such Italian nationality upon his denaturalization.

12. The respondent has sought and is seeking to deport petitioner to Italy upon the false representation that he is a citizen of Italy. Such actions upon the part of respondent are contrary to law."

10. In his brief supporting the petition for review plaintiff asserted that he was stateless and that the Government had falsely represented that he was a citizen of Italy and argued that he could not be deported to Italy because of such alleged misrepresentations.

11. The Government's brief in opposition to the petition for judicial review disputed plaintiff's contention that he was stateless. It argued that, in any event, he was a native of Italy and had come to the United States from that country and that therefore the order for his deportation to Italy complied with the statute. It denied that there had been any false representations concerning plaintiff's citizenship status.

12. On November 17, 1966, the United States Court of Appeals affirmed the deportation order, No. 15661, C.A. 7, as yet unreported. The court rejected contentions made by plaintiff during the administrative and court proceedings that the consent of Italy must be obtained before an order deporting him to Italy could be entered, stating that its concern was "only with the validity of the deportation order and not with its execution." The court then commented:

"We think that the order of deportation is in all respects proper and in conformity with section 243(a) of the act, 8 U.S.C. § 1253(a), and the regulations issued thereunder."

13. Plaintiff then filed a petition for certiorari. In his petition plaintiff asserted that the Government had

"Deliberately misrepresented to England that petitioner was a citizen of Italy although the Board of Immigration Appeals and the special inquiry officer had refused to make any finding as to citizenship." . . . "Moreover, the record clearly established that petitioner had lost his Italian citizenship in 1928 when he became a naturalized American . . . and that he had not regained it upon denaturalization in 1957. The misrepresentation to England precluded deportation to Italy."

14. In its brief in opposition to certiorari the Government contended that plaintiff's objections to the execution of the deportation order were without merit. It characterized the charge of deliberate misrepresentation to England as,

"unfounded, particularly since he concededly was born in Italy and Italy had issued a passport for him. Ultimately, of course, Italy will decide whether he is a citizen of that country, if and when execution of the deportation order again becomes imminent and an application to reinstate the passport is made."

15. On February 13, 1967, the United States Supreme Court denied the petition for certiorari.

16. It appears from the records of the Service, and from plaintiff's statement during the administrative and judicial proceedings, that about July, 1964 plaintiff instituted court proceedings in the Civil Court of Rome, Italy to obtain a declaration that he is not a citizen of Italy on a contention that he had lost his Italian citizenship upon naturalization in the United States and had not regained it upon his denaturalization, and to vitiate the Italian travel document previously issued for him. There has not yet been any hearing or decision in those court proceedings.

17. It appears from the records of the Service, and from plaintiff's statements in the administrative and judicial pro-

ceedings, that on or about April 27, 1966 the Italian Government, acting at the instance of plaintiff's representatives, suspended the validity of the travel document it had previously issued, without specifying the reason for such suspension. The Italian Government has not yet reinstated the validity of the travel document.

18. After the deportation order became final upon denial of certiorari on February 13, 1967, the Service again communicated with the Consul General of Great Britain on March 1, 1967, calling attention to plaintiff's contention that he is not a citizen of Italy but is stateless and asking whether his government would issue a document for plaintiff's deportation to England. On March 1, 1967 the Vice Consul of Great Britain responded, stating that plaintiff will not be permitted to enter Great Britain as a deportee from the United States. Copies of the relating documents are annexed hereto and incorporated herein, as Exhibits 2 and 3.

19. At no time has defendant made a determination that plaintiff is a national or citizen of Italy. As indicated heretofore, there was no such determination in the prior administrative proceedings. In seeking travel documents from Italy, at earlier stages of the proceeding, defendant expressed the opinion that plaintiff was a citizen of Italy, which represented his opinion and belief. This appears from the attached Exhibit 4, in which defendant communicated to the Italian Government full information concerning plaintiff's history and background. However, no representation of any kind concerning plaintiff's nationality has been made to Italy since the deportation order became final following the Supreme Court's recent denial of certiorari. In any future dealings with the Italian Government defendant proposes to seek reinstatement of the travel document for plaintiff and to advise that Government, as it has done in its correspond-

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ence with Great Britain mentioned in paragraph 19. of plaintiff's claim that he is stateless.

CHARLES GORDON

Subscribed and sworn to
before me this 7th day of
March, 1967

Kaye E. Clements
NOTARY PUBLIC

My Commission Expires Oct. 14, 1970.

Government Exhibit 2

219 South Dearborn
Chicago, Illinois 60604

A11 129 289

March 1, 1967

Honorable D. J. B. Robey
Consul General of Great Britain
200 South Michigan Avenue
Chicago, Illinois 60604

My dear Consul General Robey:

This refers to previous communication with your office concerning Mr. Paul DeLucia, also known as Felice DeLucia and Paul Ricca, who, in his deportation proceedings, stated that if deported he wished to be sent to England.

To an inquiry by Attorney William Scott Stewart, then representing Mr. DeLucia, your office responded on May 22, 1962, that Mr. DeLucia would not be accepted into British territory.

On April 21, 1966, your office stated, in response to an inquiry by this office that Mr. DeLucia would not be permitted to enter the United Kingdom as a deportee from the United States.

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Mr. DeLucia now contends that your office was incorrectly informed that he was a national of Italy when, in fact, he is not a national or citizen of Italy but is a stateless person. Assuming this to be true, would you now issue, to this office, a document with which to effect Mr. DeLucia's deportation to England? May we have a response as soon as possible.

Sincerely,

L. W. Hurney
District Director

P.S. Attached is form I-241 for your convenience in replying.

JJB/nlp

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
219 South Dearborn Street
Chicago, Illinois 60604

Ignorazio D. J. B. Robey
Consul General of Great Britain
205 South Michigan Avenue
Chicago, Illinois 60604

FILE# All 129 289

DATE: March 1, 1967

Dear Sir:

The person named below has been ordered deported from the United States in accordance with Section 244 of the Immigration and Nationality Act. Any person ordered deported from the United States may designate the country to which he may be sent provided such country is willing to accept him. This person has designated the country to which he wishes to be deported as England

Name of deportee	
DE RICCA, Paul aka SALVI, Paul aka RICCA, Paul aka MAGLIO, Paolo	
Date of birth	Place of birth
11-14-97	Naples, Italy
Present nationality	Occupation
CITIZENSHIP	Retired
Residence in U.S.	
1545 Bonnie Brae, River Forest, Illinois	
Grounds for deportation	
EXCLUDABLE at time of entry into the United States. (Voluntary homicide)	

JA 14

BEST COPY
from the original

Government Exhibit 3
DeLucia v. Attorney General
 Civil Action No. 422-67

Prior residence in	None
Relative or friends in	None
Name and address of closest relative	Wife - Nancy DE LUCIA
Criminal Record	Convicted of voluntary homicide in Italy

Please return the duplicate of this letter, marked to show your decision concerning whether the person named will or will not be accepted in the above-named country. The enclosed self-addressed envelope, requiring no postage, may be used for your reply. Your cooperation in this matter is greatly appreciated.

[Signature]
 L. W. Hurnoy, District Director

Title

Date: 1st March 1961.

This case has been considered and it has been determined that the person named above ☐ will
 be accepted ☒ as a deportee from the
 United States of America (Name of country)



Encl.

[Signature]
 Vice Consul of Great Britain

DATE PREPARED		INFORMATION FOR TRAVEL DOCUMENT OR PASSPORT		FILE
June 20, 1964				A 11 129 289
1. NAME	Paul DE LUOLA			
2. SEX	Male			
3. OTHER NAMES USED OR KNOWN BY	Polioce De Luola (name at birth); Paul Ricca; Paul (The Visitor) Ricca; Paolo Maglio; Paul Viel; Paul Sely			
4. CITIZENSHIP	Italian			
5. DATE OF BIRTH	6. PLACE OF BIRTH	7. DISTANCE AND DIRECTION OF PLACE OF BIRTH FROM THIS LARGE CITY		
November 14, 1897	Harles, Italy			
8. NEAREST LARGE CITY TO PLACE OF BIRTH	Harles, Italy			
9. IF CITIZENSHIP IS DIFFERENT FROM COUNTRY OF BIRTH, EXPLAIN. IF NATURALIZED IN ANY COUNTRY, SHOW DATE AND PLACE OF NATURALIZATION. CERTIFICATE NUMBER, AND STATE HOW CITIZENSHIP WAS ACQUIRED. Was naturalized at Chicago, Illinois as a U.S. citizen on September 27, 1926. His citizenship was revoked on June 11, 1957.				
10. NAMES, LOCATIONS AND DATES (YEARS) OF ATTENDANCE OF FOREIGN SCHOOLS	11. NAMES, EXACT LOCATIONS AND DATES (YEARS) OF ATTENDANCE OF FOREIGN CHURCHES. INCLUDE DATE AND NATURE OF ANY RELIGIOUS CEREMONY WHICH MAY HAVE BEEN RECEIVED.			
	Was baptized as an infant.			
12. LAST ADDRESS IN COUNTRY OF CITIZENSHIP (Show dates of residence)				
Ottaviano, Italy				
13. ADDRESS IN COUNTRY OF LAST FOREIGN RESIDENCE (Show dates of residence, and immigration status there)				
Somewhere in France				
14. PLACE OF ENTRY INTO UNITED STATES				DATE OF ENTRY INTO UNITED STATES
New York, N.Y. on S/S "Nydan" from Boulogne, France				August 12, 1920
15. LIST DATE AND PLACE OF ISSUANCE AND NUMBER OF PASSPORT, BIRTH CERTIFICATE, BAPTISMAL CERTIFICATE OR DOCUMENT OF IDENTITY. SPECIFY DATES OF MILITARY SERVICE, COUNTRY AND UNIT, RANK, SERIAL NUMBER, AND PLACES OF INDUCTION AND DISCHARGE.				

BEST COPY

from the original

Government Exhibit 4
 DeLucia v. Attorney General
 Civil Action No. 422-67

16. IN POSSESSION OF TRAVEL DOCUMENT OR PASSPORT AT TIME OF ENTRY: ☒ YES ☐ NO. DESCRIBE DOCUMENT (S). IF SUB DID NOT HAVE TRAVEL DOCUMENT OR PASSPORT AT TIME OF ENTRY, OR DOES NOT HAVE SUCH A DOCUMENT NOW, INDICATE WHETHER EVER OBTAINED ONE: ☐ YES ☐ NO. STATE HOW, WHEN, AND WHERE IT WAS OBTAINED: WHAT KIND OF DOCUMENT IT WAS, AND WHAT BECAME OF IT. **Entered the U.S. with passport of Paolo Maglio.**

17. FATHER'S NAME **Antonio De Lucia** DATE OF BIRTH **Dec. 30, 1867** PLACE OF BIRTH **Naples, Italy**
 PRESENT ADDRESS

Deceased ~~1867~~ **January 18, 1925, in Ottaviano, Italy**
 18. MOTHER'S MAIDEN NAME **Maria Annunziata** DATE OF BIRTH **Nov. 4, 1868** PLACE OF BIRTH **Ottaviano, Italy**
 PRESENT ADDRESS

Deceased ~~1868~~ **May 29, 1917, in Naples, Italy**
 19. NAME, RELATIONSHIP, AND ADDRESSES OF RELATIVES ABROAD
Four sisters residing in Italy: Anna, Luisa, Emily and Clementina.

20. PREVIOUSLY ☐ EXCLUDED ☐ DEPORTED ☐ REQUIRED TO DEPART FROM THE UNITED STATES
 ON _____ VIA _____ TO _____ (Date) (Port) (Country)

21. INDICATE WHETHER EVER ARRESTED, IN PRISON OR A PUBLIC INSTITUTION, AND IF SO, GIVE DATES AND PLACES OF CONFINEMENT. **Arrested in Italy May 18, 1917 for voluntary homicide on the 11th of Perillo, committed on July 17, 1915. Also found guilty in Third Special Assize Court, Naples, on June 30, 1924 for voluntary homicide.**

22. NAME, NATIONALITY AND PRESENT ADDRESS OF SPOUSE, AND DATE AND PLACE OF MARRIAGE
Annunziata Gigante DeLucia; Italian; 1515 Bonnie Ave., River Forest, Ill.; married (b. 1868) Jan. 29, 1929, Holy Guardian Angel Church, Chicago, Ill.

23. NAMES, AGES AND ADDRESSES OF ALL CHILDREN
None. Anthony DeLucia; and Paul DeLucia, Jr., 1515 Bonnie Ave., River Forest, Ill.

24. IF NON-CANADIAN DEPORTABLE TO CANADA, GIVE DATE AND PORT OF ARRIVAL IN CANADA, AND NAME OF VESSEL
It. 21 (cited) - homicide on Vincenzo Gigante, committed June 17, 1915.

**DEFENDANT'S STATEMENT OF MATERIAL FACTS IN
SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

[Filed March 6, 1967]

Defendant adopts as his Statement of Material Facts, the facts as set forth in the affidavit of Charles Gordon, General Counsel, Immigration and Naturalization Service (Government Exhibit No. 1).

DAVID G. BRESS

United States Attorney

JOSEPH M. HANNON

• Assistant United States Attorney

Of Counsel:

GIL ZIMMERMAN

Assistant United States Attorney

CHARLES GORDON

General Counsel

Immigration and Naturalization Service

**OPPOSITION TO DEFENDANT'S MOTIONS TO
DISMISS AND FOR SUMMARY JUDGMENT.
CROSS MOTION OF PLAINTIFF
FOR SUMMARY JUDGMENT**

[Filed March 20, 1967]

Comes now the plaintiff and by his attorneys opposes defendant's motions to dismiss and for summary judgment. Upon the annexed affidavit and upon plaintiff's administrative deportation file, the decision of the Seventh Circuit in *De Lucia v. Immigration and Naturalization Service* (No. 15661, November 17, 1966) and the pleadings and admissions herein of defendant, plaintiff cross-moves for summary judgment.

JACK WASSERMAN

DAVID CARLINER

AFFIDAVIT

[Filed March 20, 1967]

CITY OF WASHINGTON
DISTRICT OF COLUMBIA SS:

JACK WASSERMAN, being duly sworn on oath according to law, deposes and says:

1. I am one of plaintiff's attorneys and I make this affidavit in opposition to the motion of defendant for summary judgment.

2. In the deportation proceedings herein detailed and specific evidence was adduced to establish that plaintiff is in fact stateless and no longer a citizen of Italy. This evidence consisted of the following:

(a) Sworn testimony of Enrico Pavia, a member of the Italian Bar and Legal Advisor to the Italian Embassy in New York and Washington, D. C. Mr. Pavia stated that Article 8 of the Italian Nationality Law of 1912 provides:

"that an Italian citizen will lose his Italian citizenship if he spontaneously acquires a citizenship of a foreign country and establishes or has established abroad his residence." (Deportation Ex. A 104, p. 8.)

(b) Paolo Rossi, a member of the Italian Bar, confirmed the foregoing and submitted the full text of the law which is attached as Plaintiff's Exhibit A herein. He further testified that plaintiff was no longer an Italian citizen, that he lost such citizenship when he became naturalized as an American in 1928 (Deportation Ex. A 102, p. 5.).

No contrary evidence was adduced.

3. On October 25, 1965, the Special Inquiry Officer ruled that plaintiff was a native of Italy who claimed to be stateless. He directed deportation to England with an alternative order of deportation to Italy in the event England refused to accept plaintiff.

4. The Board of Immigration Appeals affirmed on April 21, 1966, merely noting that plaintiff was a native of Italy. The Board stated that plaintiff was properly ordered deported to Italy if England refused to accept him upon the ground that an alien may be deported to the country of his last foreign residence or nativity.

5. In the Court of Appeals for the Seventh Circuit plaintiff again alleged that he was stateless and no longer a citizen of Italy. The Government responded in its brief at page 15:

"The order appealed from * * * in all relevant respects conforms to the statute and regulations. Acceptance by a foreign country goes to the execution of the order, not to the validity of the order.

* * *

"The petitioner's argument (P. Br. 8, 10) that he is not a citizen of Italy and is a stateless person is not supported in the record, nor does it have any basis in law. * * * That petitioner is at least a citizen or a native of Italy, or that he came to the United States from Italy is established."

6. The Court of Appeals made no ruling upon the issue of plaintiff's statelessness or Italian citizenship. It held that the order of deportation was valid but that the problem presented by the execution of that order was not before it. The Court stated:

"But we are here concerned only with the validity of the deportation order and not with its execution.

* * * We think that the order of deportation is in all respects proper and in conformity with section 243(a) of the Act, 8 U.S.C. 1253(a) and the regulations issued thereunder."

Certiorari was denied on February 13, 1967.

7. Despite the uncontradicted evidence of plaintiff's statelessness, on April 21, 1966, the District Director of the Immigration Service advised the Government of the United Kingdom that plaintiff is an Italian national. That state-

ment is attached as Plaintiff's Exhibit B. Upon this statement, England refused to accept plaintiff. After this litigation was institution, and on March 1, 1967, the District Director modified its statement to England to allege that plaintiff claims statelessness without ever fully disclosing the basis of such claim or withdrawing the Government's ruling that he is considered a national of Italy by the Immigration Service. Upon this basis another English refusal has been obtained.

8. Similarly, the defendant has asserted to Italy that plaintiff is an Italian national and has not withdrawn this contention, nor does he intend to do so. Defendant proposes merely to advise Italy that plaintiff contends he is stateless, not that he is in fact stateless. On the contrary, defendant asserts his belief that plaintiff is an Italian citizen and will not withdraw his previous conclusion to that effect.

9. Whether plaintiff is stateless or a citizen of Italy is of considerable moment to him.

(a) He is required to notify the Immigration Service annually and specify his nationality in the Immigration Form furnished for this purpose. 8 U.S.C. 1305.

(b) He is required to seek travel documents for deportation and a place of deportation under 8 U.S.C. 1252(e). He is, therefore, required to advise foreign countries of his correct nationality or statelessness.

(c) The proper execution of the deportation order herein, the issue not decided by the Seventh Circuit, requires the Government to know judicially and definitely whether plaintiff is stateless or an Italian national.

JACK WASSERMAN

Subscribed and sworn to
before me this 17 day of
March, 1967.

Hilda Kalesh-alc
NOTARY PUBLIC

Plaintiff's Exhibit A

ITALIAN NATIONALITY ACT OF JUNE 13, 1912
(as amended by Royal Legislative Decree No. 1997 of December 1, 1934. Excerpts from pp. 268-269, Laws Concerning Nationality United Nations Legislative Series.)

Article 8

A person shall cease to be an Italian citizen if he:

(1) Of his own will acquires a foreign citizenship and establishes or has established his residence abroad.

* * *

Article 9

If a person has ceased to be an Italian citizen in pursuance of Articles 7 and 8, he may recover Italian citizenship if he:

* * *

(2) Declares to renounce the citizenship of the State of which he is a citizen * * *.

(3) Having ceased to be an Italian citizen owing to the acquisition of foreign citizenship, has been resident in the Kingdom for two years.

Nevertheless, in the cases contemplated in paragraphs (2) and (3), the person in question shall not recover Italian citizenship if the Government orders that he shall not recover the same. This order may be made by the Government for serious reasons, and in conformity with the expressed opinion of the Council of State, within three months from the fulfillment of the conditions stipulated in paragraphs (2) and (3), if the foreign citizenship most recently acquired be that of a European country, or within six months in other cases.

Plaintiff's Exhibit B

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
219 South Dearborn Street
Chicago, Illinois 60604

File: A11 129 289

Date: April 21, 1966

The person named below has been ordered deported from the United States in accordance with Section 243 of the Immigration and Nationality Act. Any person ordered deported from the United States may designate the country to which he may be sent provided such country is willing to accept him. This person has designated the country to which he wishes to be deported as England.

Name of deportee

DE LUCIA, Paul Aka SALVI, Paul Aka RICCA, Paul
Aka MAGLIO, Parole

Date of birth

11-14-97

Place of birth

Naples, Italy

Present nationality

Italian

Occupation

Retired

Residence in U.S.

1515 Bonnie Brae, River Forest, Illinois

Grounds for deportation

Excludable at time of entry into the United States. (Voluntary Homicide)

Prior residence in

None

Relatives or friends in

None

Name and address of closest relative

Wife - Nancy DE LUCIA

Criminal Record

Convicted of voluntary homicide in Italy.

Please return the duplicate of this letter, marked to show your decision concerning whether the person named

JA 24

will not be accepted in the above-named country. The enclosed self-addressed envelope, requiring no postage, may be used for your reply. Your cooperation in this matter is greatly appreciated.

L. W. Hurney
District Director

For use of Consul

Date: April 21, 1966

This case has been considered and it has been determined that the person named above ☐ will ☒ will not be permitted to enter United Kingdom as a deportee from the United States.

Encl.

F. H. Mous
Vice Consul of United Kingdom

**PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE
PURSUANT TO RULE 9(h)
[Filed March 20, 1967]**

Plaintiff by his attorneys alleges, pursuant to United States District Court Rule 9(h), that there is no genuine issue as to the following material facts:

1. Plaintiff was born in Italy and became an Italian citizen at birth.
2. Plaintiff has resided in the United States since 1920.
3. In 1928 plaintiff was naturalized as an American citizen.
4. In 1928 when plaintiff was naturalized as an American citizen, he lost his Italian citizenship under Article 8 of the Italian Nationality Law of 1912.
5. In 1957 plaintiff was denaturalized and he thereupon became stateless.
6. Defendant has determined and is of the opinion that plaintiff is presently an Italian citizen.

7. Defendant has represented to the Government of England and to Italy that plaintiff is an Italian citizen.

8. A dispute and justiciable controversy exists between the parties herein as to whether plaintiff is presently stateless or a citizen of Italy.

9. Plaintiff is not a citizen of Italy but is stateless.

JACK WASSERMAN

DAVID CARLINER

Warner Building
Washington, D. C.

Attorneys for Plaintiff

ORDER

[Filed April 21, 1967]

This cause having come before the Court on defendant's motion to dismiss or for summary judgment; and on plaintiff's cross-motion for summary judgment; and on plaintiff's motion for preliminary injunction and defendant's opposition thereto; and the Court having heard oral argument.

It is this 21st day of April, 1967,

ORDERED, ADJUDGED and DECREED that the action is hereby dismissed for lack of jurisdiction.

JOSEPH C. McGARRAGHY

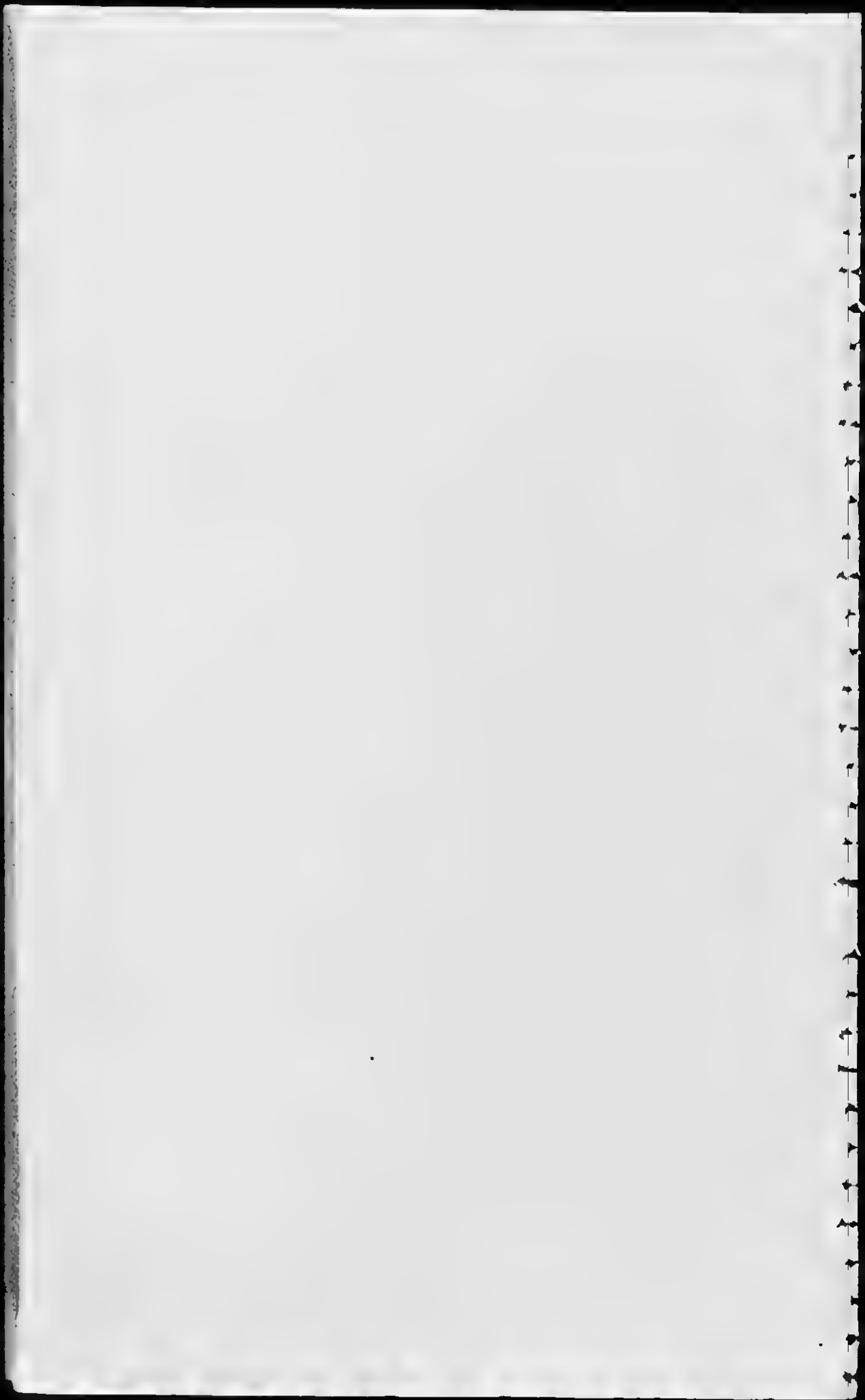
United States District Judge

NOTICE OF APPEAL
[Filed May 1, 1967]

Notice is hereby given this 28th day of April, 1967, that Plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the order and judgment of this Court entered on the 21st day of April, 1967 in favor of Defendant against said Plaintiff.

JACK WASSERMAN
902 Warner Building
Washington, D. C.
Attorney for Plaintiff

Copy to be served on the
United States Attorney



BRIEF FOR APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,030

PAUL DE LUCIA, APPELLANT

v.

ATTORNEY GENERAL OF THE UNITED STATES, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 4 1967

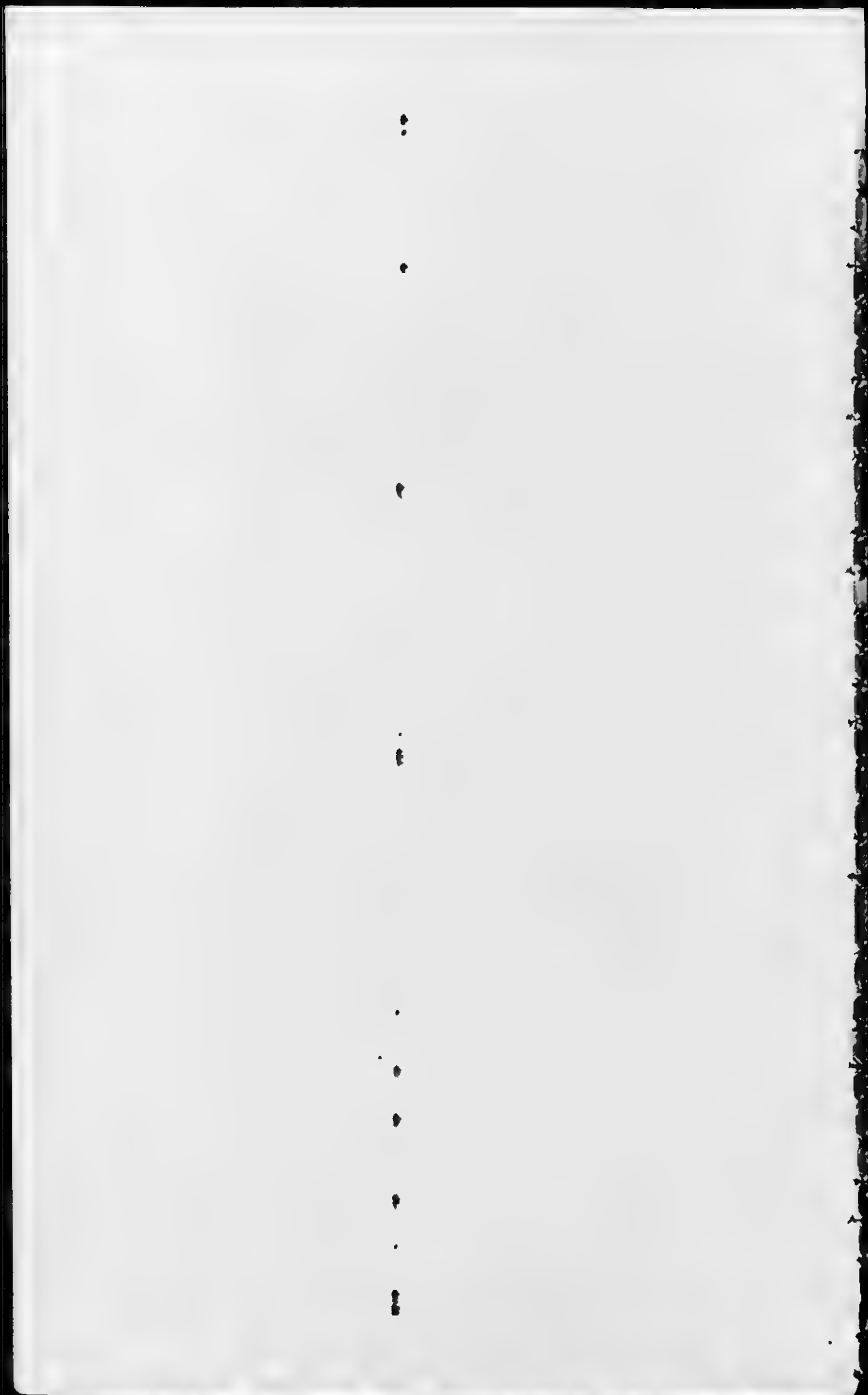
DAVID G. BRESS,
United States Attorney.

Nathan J. Paulson
CLERK

FRANK Q. NEBEKER,
Assistant United States Attorney.

Of Counsel:

CHARLES GORDON,
*General Counsel,
Immigration and Naturalization Service.*



COUNTERSTATEMENT OF QUESTIONS PRESENTED

In three previous review proceedings, all brought in the Seventh Circuit, appellant sought unsuccessfully to challenge the order for his deportation. Two of such review proceedings were fully litigated, and resulted in decisions adverse to appellant by the United States Court of Appeals for the Seventh Circuit and denial of certiorari by the United States Supreme Court. This fourth litigation, commenced by appellant almost immediately after the Supreme Court denied certiorari in his third, was brought in the United States District Court for the District of Columbia, alleged that appellee has made an ex parte ruling and false representations that appellant is a citizen of Italy, and asked the court to declare that he is not a citizen of Italy and to restrain any contrary representations by appellee.

In our view the following questions are presented by this appeal:

1. Since the alleged determinations or acts were inherently part of the proceedings to effect his deportation, could appellant maintain an action challenging them in the United States District Court for the District of Columbia despite the explicit mandate of Section 106(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1105a(a), conferring exclusive jurisdiction to review final deportation orders on the appropriate United States Courts of Appeals, here the United States Court of Appeals for the Seventh Circuit.

A negative answer to the foregoing question would end this litigation. But even if the district court were found to have jurisdiction, the following additional questions would be presented:

2. Since the appellant has already had full judicial review of his deportation order, in which he could have urged and did actually urge the very contentions he makes here, is the present suit barred by res judicata.

II

3. Since the effort to deport appellant to Italy is predicated on appellant's own assertion that he is now stateless and that he was born and resided in Italy, since the Italian Government is in possession of all the facts and has suspended the travel document which is necessary for appellant's deportation to Italy, and an Italian court has now ruled that appellant is not a citizen of Italy, has appellant demonstrated any meritorious claim.

III

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<i>Kladis v. Immigration and Naturalization Service</i> , 343 F.2d 513 (7th Cir. 1965)	10
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<i>Melone v. Immigration and Naturalization Service</i> , 355 F.2d 533 (7th Cir. 1966)	10
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<i>Talavera v. Pederson</i> , 334 F.2d 52 (6th Cir. 1964)	10

OTHER REFERENCES

Code of Federal Regulations:	
8 CFR 242.17(c)	4, 8
8 CFR 243.1 and 243.2	8
GORDON AND ROSENFIELD, IMMIGRATION LAW AND PROCEDURE:	
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*Cases chiefly relied upon are marked by asterisks.

IV

Other References—Continued

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,030

PAUL DE LUCIA, APPELLANT

v.

ATTORNEY GENERAL OF THE UNITED STATES, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant is an alien who was born in Italy in 1897 and lived in Italy until 1920, when he fled to escape prosecution for homicide after having previously been convicted and served in prison for another homicide. He entered the United States in 1920 under a false name and passport and continued the fraud in applying for naturalization which he obtained in 1928. (J.A. 6-7.) His fraud was discovered and he was denaturalized. Thereafter he was ordered deported on the basis of his fraudulent entry and

the deportation order was upheld on judicial review. (J.A. 7.) When ordered to report for deportation, he brought new proceedings for judicial review questioning alleged irregularities in the administrative proceedings. Thereafter, the administrative proceedings were reopened by stipulation of the parties, in order to afford appellant an opportunity to present applications for discretionary relief and to have the Special Inquiry Officer designate the country of deportation. (J.A. 7.)

After protracted hearings, the applications for discretionary relief were denied and the deportation order was reinstated by the Special Inquiry Officer. The Board of Immigration Appeals affirmed the deportation order and appellant then brought another petition for judicial review. The United States Court of Appeals for the Seventh Circuit ruled against him and certiorari was denied by the United States Supreme Court. (J.A. 7-10.)^{1a} Immediately thereafter, he brought the present proceeding in the United States District Court for the District of Columbia, seeking a declaratory judgment and injunction, contending that appellee had improperly determined and misrepresented that he was a citizen of Italy, and requesting declaratory and injunctive relief against such alleged determination and misrepresentation. (J.A. 2-5.)

Appellee forthwith filed a motion to dismiss, or, in the alternative, for summary judgment, and opposed appellant's motion for a preliminary injunction. (J.A. 5.) The motions were heard by Judge Joseph C. McGarraghy, who ruled without opinion at the conclusion of oral argument that the court lacked jurisdiction and on April 21, 1967 signed an order dismissing the action for lack of jurisdiction. (J.A. 25.)

STATUTES AND REGULATIONS INVOLVED

Section 106(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1105a(a) provides, in part:

^{1a} *De Lucia v. INS*, 370 F. 2d 305 (C.A. 7, 1966), cert. den., 386 U.S. 912 (1967).

The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.),¹ shall apply to and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later;

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit.

Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. § 1253(a) provides:

The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States . . . If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. There-

¹ The 1950 statute, known as the Hobbs Act, has now been recodified as 28 U.S.C. 2341-2352 by Sec. 4(e), Act of September 6, 1966, P.L. 89-554, 80 Stat. 622.

upon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

- (1) to the country from which such alien last entered the United States;
- (2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
- (3) to the country in which he was born;
- (4) to the country in which the place of his birth is situated at the time he is ordered deported;
- (5) to any country in which he resided prior to entering the country from which he entered the United States;
- (6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
- (7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

8 CFR 242.17(c) provides as follows:

The special inquiry officer shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special

inquiry officer shall then specify and state for the record the country, or countries in the alternate, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country.

SUMMARY OF ARGUMENT

I

The district court correctly found that it lacked jurisdiction. Under Sec. 106(a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a) exclusive jurisdiction to review final orders of deportation is conferred upon the appropriate Courts of Appeals, here the United States Court of Appeals for the Seventh Circuit. The statute's goal of minimizing repetitious attacks on deportation orders and to prescribe a single, unitary review proceeding was implemented and endorsed by the Supreme Court in *Foti v. INS*, 375 U.S. 217 (1963) and *Giova v. Rosenberg*, 379 U.S. 18 (1964).

The instant proceeding represents an effort to revive the type of repetitious, piecemeal attacks Sec. 106(a) was designed to eliminate. A similar effort to press a challenge to a single aspect of a deportation proceeding was repulsed in *Attorney General v. Bufalino*, — U.S. App. D.C. —, 371 F.2d 738 (1966), where this Court declared that:

For the District Court and this Court now to assert jurisdiction over this segment of appellee's attack on the new proceeding would defeat the fundamental purpose behind § 106(a), which was to consolidate the review of deportation orders in a single forum.

This is one of several recent efforts, thus far uniformly unsuccessful, to persuade the courts in the District of Columbia to rule on aspects of deportation proceedings which were conducted in other jurisdictions. We respect-

fully suggest that the endorsement of this selective attack on one aspect of the deportation proceeding would encourage the concentration of litigation in the District of Columbia presenting repeated assaults on such proceedings. This would frustrate the statutory prescription for a single, unitary proceeding.

II

Even if there were jurisdiction, this action would be barred by *res judicata*. The suit followed a review proceeding in which the United States Court of Appeals for the Seventh Circuit upheld the deportation order and certiorari was denied. In that review proceeding appellant could have, and did, advance the very contentions he urges here. His new suit is barred by the familiar principles of *res judicata* and by the direct injunction of Sec. 106(c) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1105a(c) which precludes repetitious challenges to deportation orders in the absence of a showing that the prior remedy was inadequate.

III

There never was any meritorious basis for this action. The administrative authorities accepted appellant's statement that he is stateless and, under the express authorization of Sec. 243(a) of the Immigration and Nationality Act, 8 U.S.C. § 1253(a) directed his deportation to Italy, the land of his birth and former residence. There never was any determination that he was a national of Italy, since such a determination was unnecessary under the statutory scheme.

But even if there ever had been any vestige of merit, the supposed basis for this litigation has been expunged by the Italian government's suspension of the travel document and by the Italian court's ruling that he is not a citizen of Italy. Under these circumstances appellant is pressing a nonexistent controversy on hypothetical issues. His claim was never meritorious and in any event is now moot.

ARGUMENT

I. The District Court Lacked Jurisdiction.

Under section 106(a) of the Immigration and Nationality Act, as amended, which is quoted above, exclusive jurisdiction to review final orders of deportation is conferred on appropriate United States Courts of Appeals, here the United States Court of Appeals for the Seventh Circuit. The purpose of that statute was to prevent repeated and fragmented attacks on final deportation orders, like the one attempted here. In *Foti v. INS*, 375 U.S. 217 (1963), the Supreme Court reviewed the legislative history of section 106 and ratified its purpose to eliminate piecemeal reviews in deportation cases and to provide a single, unitary, and exclusive method for review of all determinations made in deportation proceedings. In its later decision of *Giora v. Rosenberg*, 379 U.S. 18 (1964), the Supreme Court read section 106 even more expansively and found that the exclusive remedy for review of final deportation orders, prescribed by that statute, encompassed challenges to the denial of motions to reopen the deportation proceedings.

Here, the reopened deportation hearing resulted in a final deportation order against appellant. Under *Foti v. INS*, *supra*, "all determinations made during and incident to the administrative proceeding" were reviewable only by a review proceeding brought in the United States Court of Appeals for the Seventh Circuit. 375 U.S. at 229. In such a review proceeding appellant could have, and did, contend that there were improprieties in fixing the place for his deportation, or that there had been other deviations from legality or fairness. But section 106 and *Foti v. INS* require that all such challenges be presented in a single review proceeding brought in the Court of Appeals.

Despite these plain mandates appellant contests the deportation order against him by seeking a declaratory

review and injunction of a single aspect of the deportation proceeding. We respectfully submit that the district court had no jurisdiction to entertain such a selective challenge to a deportation order. Indeed, this is the fourth proceeding for judicial review questioning the deportation order and we submit that if this Court were to ratify jurisdiction, the purpose of section 106 to end repeated attacks on deportation orders would be completely frustrated.

Appellant sought to disguise his challenge to the deportation order by refraining from the use of language which in terms addressed that order. But his purpose to defeat the accomplishment of that order is clear and his disregard of the direct injunction of section 106 cannot be disguised by semantics. Indeed, allegation 7 of the Affidavit in Support of Plaintiff's Application for Injunctive Relief (J.A. 5) explicitly disclosed his purpose to obstruct and defeat the deportation order.

Appellant contends that the district director in Chicago made a "determination of Italian citizenship" which is not part of the deportation order and which he can attack in an independent review proceeding brought in the district court. Both hypotheses on which this assertion rests are fallacious. In the first place, under present procedures, effective since 1962, the district director has no authority to make such determinations. Only the special inquiry officer, subject to appeal to the Board of Immigration Appeals, is authorized to make any determinations regarding the place of deportation, including determinations regarding the deportee's nationality. The district director's functions in this regard are ministerial, limited to executing the special inquiry officer's directives. 8 CFR 242.17(c), 243.2; 2 GORDON AND ROSENFIELD, IMMIGRATION LAW AND PROCEDURE (1966 Rev.), § 5.8f, 5.17. This is precisely what happened here. The special inquiry officer and the Board of Immigration Appeals accepted appellant's assertion that he was stateless and directed appellant's deportation to England, the

country he designated, and alternatively to Italy, the country where he was born and had resided. (J.A. 8.) As the United States Court of Appeals for the Seventh Circuit found, this procedure complied fully with the statute and regulations. (J.A. 9.) The district director's descriptive statements of background information cannot, in our view, be regarded as a "determination", subject to judicial review.

But even if this descriptive statement were regarded as a "determination" it seems manifest that such a determination is not suspended in lonely isolation, with no nexus to other proceedings. It is inherently concerned with implementation of the deportation edict, and thus must be regarded as part of the final deportation order reviewable only in the United States Court of Appeals for the Seventh Circuit, under the exclusive review procedure prescribed in section 106(a). It is appellant's thesis that he can isolate selected portions of the administrative process and subject them individually, and successively, to scrutiny in the district courts, before, during, or after the prosecution of the remedy afforded by section 106(a). We submit that the acceptance of this thesis would in effect demolish the statutory scheme and would disregard the *Foti* holding that "all determinations made during and incident to the administrative proceeding" are reviewable only in the appropriate Court of Appeals. Moreover, it would result in a proliferation of litigation in the district courts considering various aspects of the deportation proceeding, instead of the single, inclusive proceeding for review prescribed by section 106. Under section 106, all such claims arising in a deportation proceeding are reviewable in the unitary proceeding for judicial review provided by that section.

We note that in *Attorney General v. Bufalino*, — U.S. App. D.C. —, 371 F.2d 738 (1966), this Court repulsed a similar selective challenge. There the alien sought to contest the fairness and propriety of a de-

portation order by questioning one phase of the process through a suit in the district court, designated by him as a proceeding to enforce a prior mandate. This Court dismissed the action, finding the district court without jurisdiction. The Court observed, 371 F.2d at 340.

. . . For the District Court and this court now to assert jurisdiction over this segment of appellee's attack on the new proceedings would defeat the fundamental purpose behind § 106(a), which was to consolidate review of deportation orders in a single forum and thus "to abbreviate the process of judicial review * * * in order to frustrate certain practices * * * whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti v. Immigration & Naturalization Service*, *supra*, 375 U.S. at 224

The impropriety of this litigation is even more manifest than in *Bufalino*, since the review sought in that case preceded review in the appropriate Court of Appeals, while here the selective review is proposed after the judicial proceedings under section 106 have been completed.

Appellant cites several cases holding that district courts still have authority to review determinations made outside the deportation proceeding itself. He has neglected to inform the Court that this limited reading is repudiated in other jurisdictions, which hold that such ancillary determinations, involving the denial of relief which in effect would extinguish or delay deportation, are reviewable only in the Courts of Appeals as part of the final deportation order. *Skiftos v. INS*, 332 F.2d 203 (7th Cir., 1964); *Melone v. INS*, 355 F.2d 533 (7th Cir., 1966); *Kladis v. INS*, 343 F.2d 513 (7th Cir., 1965); *Talavera v. Pederson*, 334 F.2d 52 (6th Cir., 1964). We favor the more generous reading offered by the latter decisions, which seems to us more consonant with the concept of unitary review expounded in section 106(a). But we suggest that not even the courts cited

by appellant would sanction fragmented review of a "determination", like that here, which was in no sense extrinsic but was actually inherent in the administrative process of adjudicating and implementing deportability.

In our view appellant's contention that section 106(a) relates only to determinations made during the deportation hearing ignores the explicit holding of the Supreme Court in *Giova v. Rosenberg*, 379 U.S. 18 (1964), which sanctioned section 106(a) review exclusively in the appropriate Court of Appeals of denial of a motion to reopen the deportation proceeding.² Manifestly such denials occur after the hearing and after the deportation order is entered. In finding section 106(a) applicable to such determinations the Supreme Court extended its generous appraisal in *Foti*, which had read the statutory reference to "all final orders of deportation" as including all determinations made in the deportation proceeding. *Giova* interpreted "all final orders of deportation" as including determinations made after the deportation hearing which, as here, bear directly on the continuing vitality or implementation of the deportation decree.

Finally, we invite the court's attention to repeated recent efforts to invoke judicial review in the United States District Court for the District of Columbia in regard to deportation orders entered in other parts of the United States. In most such instances the plaintiffs were represented by the able and experienced counsel who appear in the instant proceeding. The instant case and the previously cited *Attorney General v. Bufalino*, which originated in Philadelphia, are examples. Another example is *Adamo v. Attorney General*, Civil Action No. 205-65, U.S.D.C., Dist. of Col., originating in Newark, in which Judge Holtzoff on June 20, 1967 dismissed the complaint

² This issue had previously been reserved in *Foti*, where the Supreme Court had pointed out that the question was a "somewhat different one, since such an administrative determination is not made during the same proceeding where deportability is determined and discretionary relief is denied." 375 U.S. at 231.

for lack of jurisdiction, under the authority of *Foti v. INS, supra*.³ An additional example is *Lau v. Attorney General*, Civil Action No. 1487-67, U.S.D.C., Dist. of Col., in which four Chinese aliens whose cases had been considered in New York sought judicial review in the District of Columbia after the Court of Appeals for the Second Circuit had rejected similar contentions, and certiorari was denied, in litigation presenting the same issues but involving other aliens. On June 12, 1967, Judge Jones denied a Temporary Restraining Order and on the same day this Court (Judges Danaher, Wright, and Leventhal) denied a stay of deportation.

We respectfully suggest the possibility that the endorsement of this litigation would encourage a concentration in the District of Columbia of litigation seeking to forestall deportation, a situation section 106(a) sought to avoid. Moreover, such endorsement would encourage repeated and piecemeal attacks in the district court, contrary to the major aim of section 106(a). See H. Rep. 1086, 87th Cong., 1st Sess., pp. 22, 28; *Foti v. INS, supra*. In short, the acceptance of such fragmented challenge addressed to one selected aspect of the administrative proceeding would nullify the Congressional mandate for a single, unitary review in the appropriate Court of Appeals.

We believe the district court's dismissal for lack of jurisdiction was clearly right.

II. The Action Is Precluded by Res Judicata.

Even if the district court had jurisdiction, we believe appellant's plea must fail for a number of additional reasons. First, as we have indicated, this suit was commenced almost immediately after the conclusion of a proceeding for judicial review in which the United States Court of Appeals for the Seventh Circuit ruled against appellant and the Supreme Court denied certiorari. In that review proceeding appellant could have urged, and

³ We are informed that no appeal is being taken.

actually did urge, the very contentions he is making here. As the Exhibits appended to the motion for summary judgment demonstrate, he contended throughout the course of the administrative and judicial proceedings that he was not a national of Italy and that he had lost Italian nationality upon his naturalization in the United States. He also contended in the prior review proceedings that the Government had made the very alleged misstatements of which he complains here. (J.A. 8-10.) We will not burden the court with the citation of authorities for the familiar proposition that *res judicata* bars contentions which were made or could have been made in prior judicial proceedings. We also call to the court's attention the explicit injunction of Sec. 106(c) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1105a(c), which provides—

... No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

The United States Court of Appeals for the Seventh Circuit, after considering appellant's contentions, stated:

We think that the order of deportation is in all respects proper and in conformity with section 243(a) of the Act, 8 U.S.C. § 1253 and the regulations issued thereafter. (J.A. 9; 370 F.2d at 309.)

It is not true that the Court of Appeals had not considered the contentions made by appellant. As we have noted, appellant contended throughout the administrative and judicial proceedings that he was stateless. The court's finding that the proceedings were "in all respects proper" ratified the administrative acceptance of appellant's assertion that he was stateless and the finding that under Sec. 243(a) of the statute, 8 U.S.C. § 1253(a) he was

consequently deportable to Italy, the place of his birth and former residence. The court's observation that it was concerned "only with the validity of the deportation order and not its execution" was addressed to appellant's contention that no deportation order could be entered until an acceptance from Italy was received. In any event, if the Court of Appeals for the Seventh Circuit omitted to adjudicate any aspect of appellant's claims he must seek redress in that court. He cannot, in our view, ask the District Court for the District of Columbia to review the decision of the Court of Appeals for the Seventh Circuit and to remedy alleged omissions in that Court's holding.

We submit that this attempt to relitigate appellant's claims is barred by *res judicata*.

III. Appellant's Contentions Are Without Merit.

The supposed meritorious basis for this action is unsupportable. It is not true that appellee has made a determination that appellant is a citizen of Italy. Throughout the administrative proceedings, as we have noted, appellant contended that he was not a national of Italy. Both the Special Inquiry Officer and the Board of Immigration Appeals recited appellant's claim that he was stateless and avoided a determination that he was an Italian national. Instead, they found that under all the relevant contingencies described in section 243(a), appellant was deportable to Italy, since he had been born in Italy and had last resided in that country. (J.A. 7-9.) In the Court of Appeals and in the Supreme Court, the government likewise avoided reliance upon a conclusion that appellant was a citizen of Italy, and argued merely that the designation of Italy as the place for his deportation adhered precisely to the directives of the statute and the regulations, which authorize a deportee's return to the place of his birth or last residence. (J.A. 9-10.) And, as we have shown, the United States Court of Appeals for the Seventh Circuit found that the order for appellant's deportation to Italy complied with the statute and the regulations.

Appellant now contends for the first time that there was an improper ex parte determination that he was a citizen of Italy. This contention was open to him in the prior administrative and judicial proceedings, but was not made. Indeed, appellant complained throughout those proceedings because, in the language of his recent petition for certiorari (J.A. 10), "the Board of Immigration Appeals and the special inquiry officer had refused to make any finding as to citizenship."

Appellant's contention apparently is premised on the statements to England and Italy, both made in 1964 and hardly relevant at this later stage in the proceeding, that he was a citizen of Italy. But, as shown in the Exhibits supporting our motions in the district court, these descriptive statements in the 1964 applications for travel documents in no sense "determinations". (J.A. 12-17.)

The related assertions that appellee had deliberately made false representations to England and Italy, were likewise urged in the prior proceedings before the Seventh Circuit and were without foundation. As we show in the Exhibits accompanying our motions in the district court, the relevant facts were fully disclosed in the documents submitted to England and Italy. (J.A. 11-17.) This case is thus different from *Di Felice v. Shaughnessy*, 114 F. Supp. 791 (S.D.N.Y. 1943), in which there had been a misstatement of fact concerning prior residence. Here the facts were accurately set forth in the underlying documents. The statement made in the 1964 applications for travel documents that appellant was a citizen of Italy was an expression of the district director's opinion or his legal conclusion. We hardly see its relevance insofar as acceptance of appellant by England is concerned. With regard to Italy, we are confident that the Italian government is quite competent to determine whether appellant is an Italian citizen, and would hardly feel itself bound by the Attorney General's expression of opinion.

In any event, subsequent developments have removed even the slender reeds upon which appellant sought to rest

his claim herein. With regard to Great Britain, Exhibits 2 and 3 (J.A. 12-15) show that on March 1, 1967, after the Supreme Court's recent denial of certiorari, a new communication was addressed to that government specifically calling attention to appellant's claim that he is stateless, and that the British government promptly responded that appellant would not be permitted to enter Great Britain as a deportee from the United States. With regard to Italy, appellant himself brought litigation in the Italian courts seeking a declaration that he is not a citizen of Italy and a directive rescinding the travel document previously issued for him. That travel document was in fact suspended by the Italian government in April 1966. And appellant now informs us (Br. 3, 8) that the Italian courts ruled on March 20, 1967 that he is no longer a citizen of Italy. In the light of the full revelation of the facts to the Italian Government, of the Italian Government's suspension of his travel document, and of the ruling by Italian courts that he is no longer a citizen of Italy, we hardly believe there is any basis for appellant's claim that the Italian government was misled.

We must confess our inability to follow appellant's reasoning in his argument (Br. 3, n. 4) that in the light of the Italian Government's suspension of his travel document and of the Italian court's ruling that he is not a citizen of Italy, the government can no longer assert "its stereotype and familiar claim that this lawsuit is for the purpose of delay". Appellant's premises lead us to a different conclusion. Frankly, we are at a loss to find any plausible reason for the continuance of this litigation, particularly in the light of the appellee's assurance to the court below (J.A. 11) that in any future dealings with the Italian Government seeking a reinstatement of the travel document for appellant, it will advise that government, as it has done in its most recent correspondence with England, of appellant's claim that he is stateless.

The only conceivable explanation for pressing this appeal is that appellant somehow wishes to keep the ball of

litigation bouncing somewhere, hoping it may offer a possibility of obstruction in the event Italy hereafter decides to reinstate the travel document on the basis of his birth and prior residence in that country. Any supposed issue as to appellant's nationality has been ended by the ruling of the Italian court.

It thus appears that there is no showing here of an actual controversy or of anticipated irreparable harm which are the recognized predicates for declaratory and injunctive relief. Indeed, the controversy has in effect now become moot, since there is no possibility that the Governments of Italy or the United States would hereafter regard appellant as a citizen of Italy, in the face of the contrary holding of the Italian court. Actually, therefore, appellant is continuing to press a nonexistent controversy on hypothetical issues. Such jousting with straw men may be an exercise pleasing to appellant, but it does not offer the type of active, tangible dispute that is justiciable in this court. We urge that appellant's claim never had any meritorious basis and that in any event it is now moot.

CONCLUSION

The judgment of the district court should be affirmed.

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REPLY BRIEF

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,030

PAUL DE LUCIA,
Appellant

v.

ATTORNEY GENERAL
OF THE UNITED STATES,
Appellee.

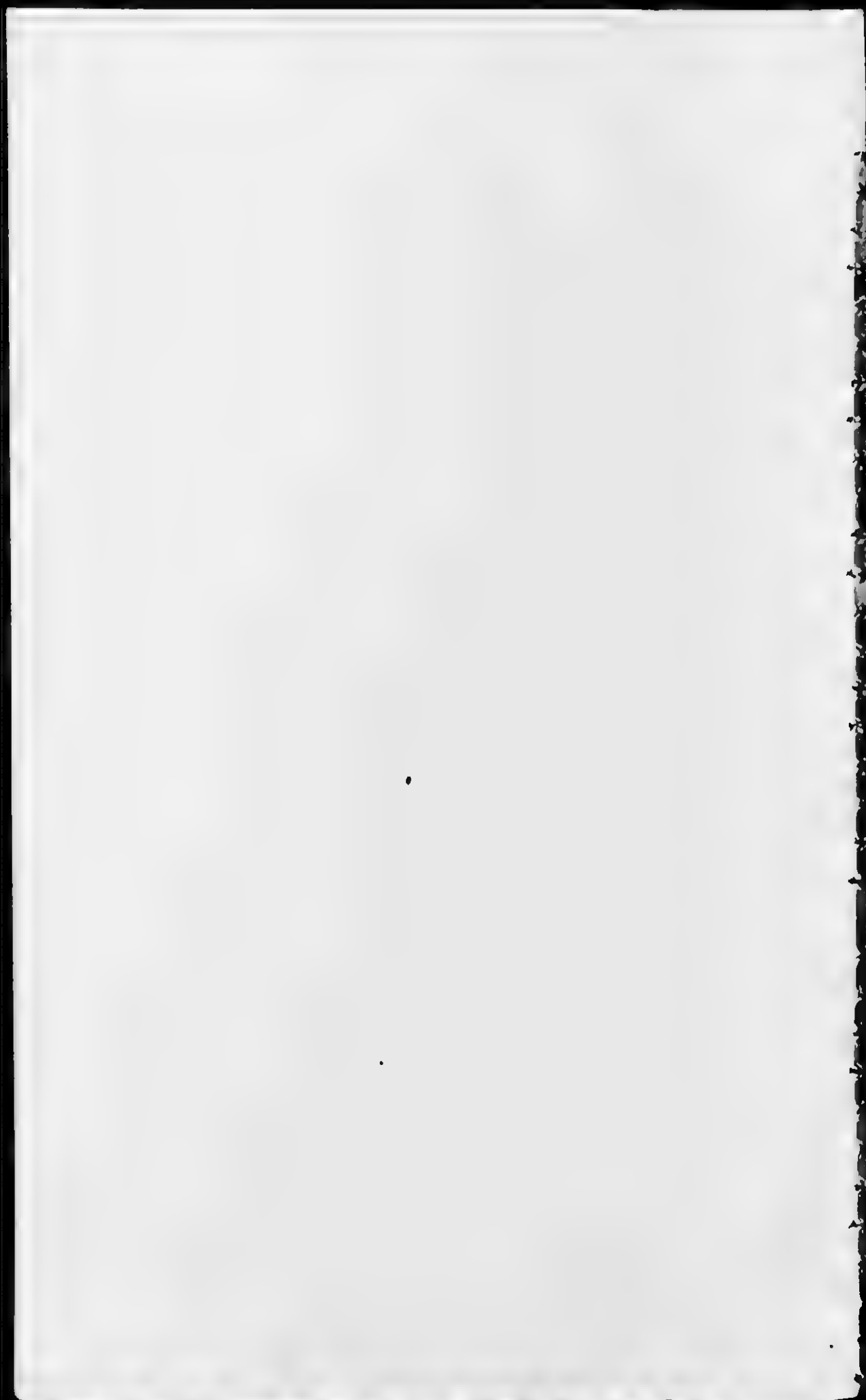
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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(i)

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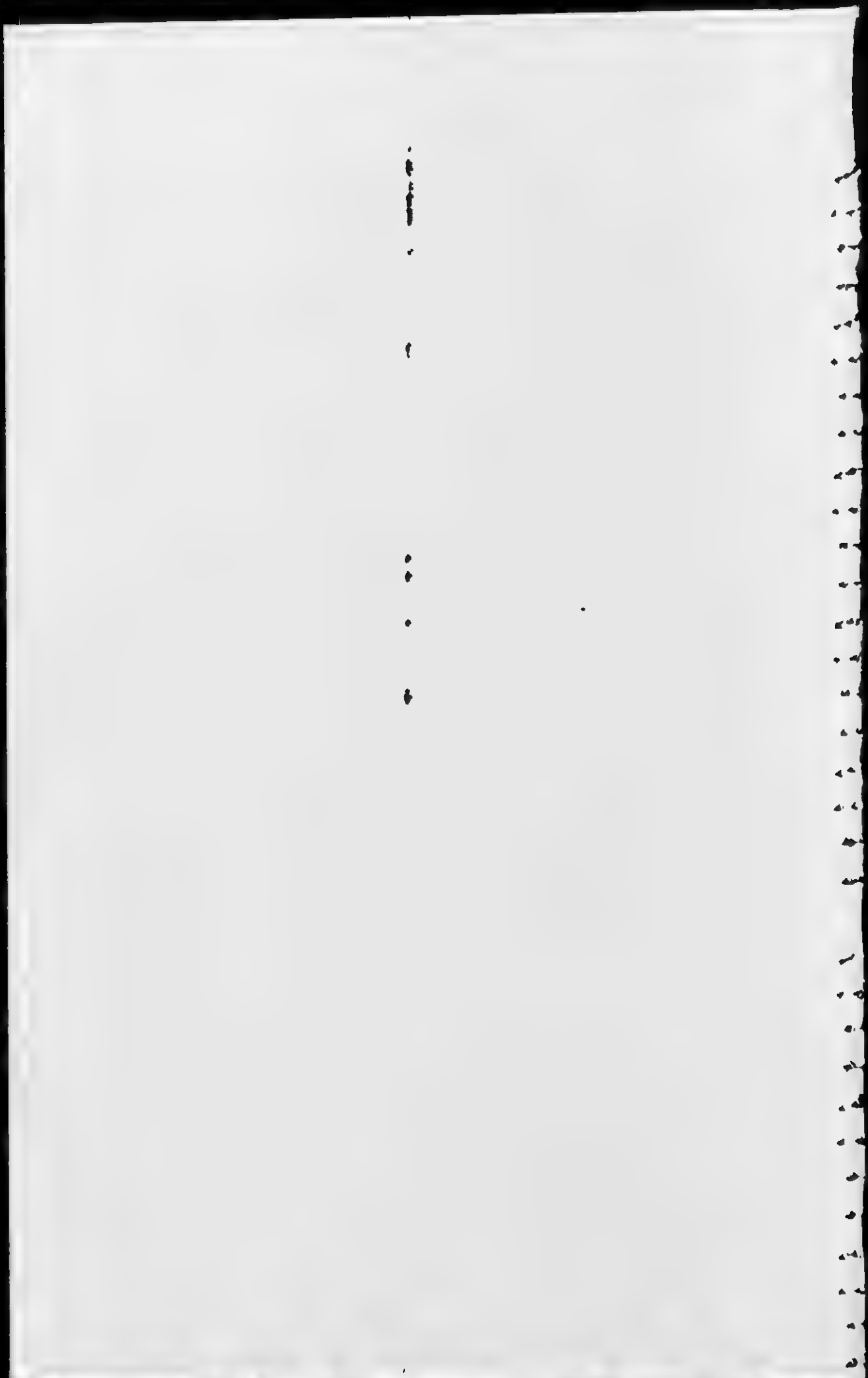
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,030

PAUL DE LUCIA,
Appellant

v.

ATTORNEY GENERAL
OF THE UNITED STATES,
Appellee.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

REPLY BRIEF

1. *The Jurisdictional Issue.* Appellee asserts that appellant's position on the jurisdictional issue herein "is repudiated in other jurisdictions" (Brief, p. 10).

On the contrary, the position of appellant on jurisdiction is supported by the Second Circuit, *Mui v. Esperdy*, 371 F.2d 772 (2nd Cir., 1966), cert. denied 386 U.S. 1017; *Li Cheung v. Esperdy*, 377 F.2d 819 (2nd Cir., 1967); the Third Circuit, *Cheng Fan Kwok v. Immigration and Naturalization Service*

(No. 16,005, August 4, 1967); *Mui v. Rinaldi*, 262 F. Supp. 258 (D. N.J., 1966); the Fifth Circuit, *Samala v. Immigration and Naturalization Service*, 336 F.2d 7 (5th Cir., 1964); and the Eighth Circuit, *Mendez v. Major*, 340 F.2d 128 (8th Cir., 1965).

The Sixth Circuit, *Talavera v. Pederson*, 334 F.2d 52 (6th Cir., 1964), and the Seventh Circuit, *Roumeliotis v. Immigration and Naturalization Service*, 304 F.2d 453 (7th Cir., 1962); *Skiftos v. Immigration and Naturalization Service*, 332 F.2d 203 (7th Cir., 1964); *Kladis v. Immigration and Naturalization Service*, 343 F.2d 513 (7th Cir., 1965); *Melone v. Immigration and Naturalization Service*, 355 F.2d 533 (7th Cir., 1966), espouse the view advocated by appellee.

In this Circuit, judicial review was permitted of a registry application under 8 U.S.C. 1259 and of an application for a stay of deportation under 8 U.S.C. 1253(h) filed subsequent to a deportation order in proceedings separate from the deportation hearing. *Bufalino v. Kennedy*, 116 App. D.C. 266, 322 F.2d 1016 (D.C. Cir., 1963). In the *Bufalino* case the Government stated in its Court of Appeals brief, p. 3, note 2:

"This new section [8 U.S.C. 1105(a)] confers exclusive jurisdiction upon the Courts of Appeals to conduct judicial review of all 'final orders of deportation * * * made * * * pursuant to administrative proceedings under Section 242 (b)' of the Act. * * * The matters under judicial review here were not determined in administrative proceedings under Section 242(b) of the Act, 8 U.S.C. 1252(b)."

Attorney General v. Bufalino, ___ App. D.C. ___, 371 F.2d 738 (D.C. Cir., 1966), is not to the contrary. There, judicial review was sought of adjudications rendered in the deportation hearing conducted under 8 U.S.C. 1252(b). *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1963), likewise involved a denial of discretionary relief rendered in the deportation proceeding conducted under 8 U.S.C.

1252(b) and the decision of *Giova v. Rosenberg*, 379 U.S. 18 (1964), involved an attempt to reopen a deportation hearing conducted under the same section of the immigration statute. See *Mui v. Rinaldi*, 262 F. Supp. 258 at 263 (D. N.J. 1966). In the instant case, we are concerned with an adjudication of citizenship made outside the deportation hearing, not by a Special Inquiry Officer or the Board of Immigration Appeals, but by a District Director outside the deportation hearing conducted under 8 U.S.C. 1252(b).

The issue is not whether adoption of the jurisdictional view of the majority of circuits will encourage piecemeal litigation or increase litigation in the district courts throughout the country.¹ The statute as interpreted by the Seventh Circuit authorizes piecemeal litigation.² There were two actions for judicial review herein with reference to this case and in its last decision the Seventh Circuit refused to review the proposed execution of the deportation order, *De Lucia v. Immigration and Naturalization Service*, 370 F.2d 305 at 309 (7th Cir., 1966), cert. denied, 386 U.S. 912. The fragmentation of administrative procedures caused the fragmentation of judicial review. Numerous applications may be adjudicated by a District Director and Regional Commissioner prior to and apart from any deportation proceedings.³ 8 C.F.R. 103.1(e), (f) (1965 Ed.). Numerous applications

¹The view of the majority of the circuits permits litigation in various district courts throughout the United States. It does not encourage a concentration of litigation in the District of Columbia as forecast by appellant (Brief, p. 12). Moreover, this consideration should not be the basis for a decision on the jurisdictional issue.

²In addition, successive habeas corpus proceedings are not precluded by the statute.

³"It appears to be universally agreed that if there has been no deportation proceeding review can still be brought in the district court * * * provided other applicable requirements are met", 2 *Gordon & Rosenfield, Immigration Law and Procedure*, pp. 8-63.

may be adjudicated subsequent to and apart from any deportation proceedings. These applications are adjudicated by officials who do not participate or adjudicate the issues involved in a deportation proceeding under 8 U.S.C. 1252(b).

Congress has decided that only final orders of deportation in proceedings under 8 U.S.C. 1252(b) should be reviewable in the Court of Appeals. Other adjudications, and there are many of this character, were not considered of sufficient importance to require Court of Appeals review. The statute should not be recast to give the Court of Appeals exclusive review of all orders made by immigration officers. *Mui v. Esperdy*, 371 F.2d 772 (2nd Cir., 1966), cert. denied, 386 U.S. 1017. It is not for the courts to add to the legislation what Congress pretermitted. *United States v. Monia*, 317 U.S. 424, 430 (1943); *Story v. Snyder*, 87 App. D.C. 96, 184 F.2d 454 (D.C. Cir., 1950), cert. denied 340 U.S. 866, *Mui v. Rinaldi*, 262 F. Supp. 258, 263 (D. N.J., 1966).

2. *The Issue on the Merits Herein Is Not Precluded by Res Judicata.* Appellee takes the inconsistent position that there was no administrative adjudication that appellant is an Italian citizen and at the same time that *res judicata* precludes consideration of the merits herein because it has been settled administratively and judicially.

Res judicata must be determined by the pleadings in the prior action and the burden of proof is upon the party asserting such defense. *St. Lo Construction Co. v. Koenigsberger*, 174 F.2d 25 (D.C. Cir., 1949); *United States v. Burch*, 294 F.2d 1, 6 (5th Cir., 1961). The doctrine of *res judicata* does not apply to issues raised in a previous case but not decided. It only applies to issues litigated and decided. *So. Pacific R.R. Co. v. United States*, 168 U.S. 1, 48, 49 (1897); *United States v. Burch*, *supra*; *United States v. International Bldg. Co.*, 345 U.S. 502 (1952); *Getlen v. Maryland Casualty Co.*, 196 F.2d 249 (9th Cir., 1952); 30 *Am. Jur.*, Secs. 374, 375. Evidentiary facts or matters referred to in an opinion are not *res judicata*. *The Evergreens v. Nunan*, 141 F.2d

927 (2nd Cir., 1944); 30 *Am. Jur.*, Sec. 380. The matters involved and subject to *res judicata* must be essential or necessarily involved in the judgment of the court in the prior litigation. *United States v. Cathcard*, 70 F. Supp. 653 (D. Neb., 1946).

Here, the issue of statelessness was not decided administratively in the deportation hearing, was not decided by the Board of Immigration Appeals and was avoided by the Seventh Circuit. No case has ever held that under such circumstances an issue is foreclosed by *res judicata*.

3. *The Adjudication of Appellant's Statelessness.* In the District Court appellee asserted that the District Director's determinations that appellant is a citizen of Italy (JA 16, 23) "were in no sense 'determinations' but merely represented defendant's opinion and belief." Defendant's Points and Authorities, p. 9. In this Court, appellee now contends that the statements by the District Director (JA 16, 23) that appellant is a citizen of Italy are only descriptive and are in no sense determinations (Brief, p. 15). It is also alleged that a statement by the Special Inquiry Officer in his opinion that appellant claims to be stateless is an acceptance of such claim. We cannot accept this line of reasoning.

The forms utilized by the Immigration and Naturalization Service (JA 16, 23) called for "Present Nationality" or "Citizenship". They were answered affirmatively with the notation "Italian". No qualification was given to indicate doubt, reservation, opinion or description.

A person's citizenship is not normally considered a matter of mere opinion or description.

A person claiming to be a United States citizen may be guilty of a false representation as to citizenship. 18 U.S.C. 911; *United States v. Franklin*, 188 F.2d 182 (7th Cir., 1951); *Smiley v. United States*, 181 F.2d 505 (9th Cir., 1950), cert. denied 340 U.S. 817. Statements as to citizenship are not considered an expression of an opinion or description. We submit that a definitive statement as to citizen-

ship not expressed as an opinion or mere description is a representation of fact. Such representation of fact was made here by appellee through his agents. No basis exists for considering the statements made by appellee as a mere representation of an opinion or description. They were not couched in terms of an opinion or mere description. The statements were in truth false representations which appellee now seeks to avoid by improperly and belatedly characterizing as an opinion or description. The false representation appellee is guilty of cannot be sidestepped so blithely.

4. *Appellee Is Stateless and a Justiciable Issue Is Presented as to His Citizenship or Statelessness.* Prior to this litigation appellee refused to concede that appellant was stateless. Prior to this litigation a Special Inquiry Officer merely acknowledged that appellant claimed statelessness. After the institution of this litigation the Chicago District Director who had asserted in communications to the Italian and English officials that appellant is an Italian (JA 16, 23) revised her statement to acknowledge to English officials that appellant contended he is stateless (JA 12-13). At no time has the Chicago District Director straightforwardly and unequivocally acknowledged that appellant is stateless. On the record, the refusal to unequivocally acknowledge appellant's statelessness creates a bona fide dispute entitling him to a declaratory judgment.

Perkins v. Elg, 307 U.S. 325 (1939), recognized that incorrect declarations as to citizenship of an individual by public officials furnish a basis for declaratory judgment relief. *McGrath v. Kristensen*, 340 U.S. 162 (1950), recognized justiciability where an alien was declared ineligible for citizenship. See also: *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1954); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1936); and *Duvall, Declaratory Judgment Actions: Present Day Uses of a Tested Procedure*, 34 American Bar Association Journal 379 (1938).

The instant controversy is justiciable and ripe for determination under the foregoing cases.

No factual or legal basis is furnished for the contention that appellant is an Italian, or merely claimed statelessness. Accordingly, no genuine issue is presented on the matter and appellant is entitled to summary judgment.

5. *The Issue Presented Is Not Moot. Appellant Is Entitled to a Declaratory Judgment and Injunctive Relief.* After the institution of this litigation on February 23, 1967, appellee sought to modify the effect of his false representation to the United Kingdom that appellant is an Italian citizen. On March 1, 1967, the Chicago District Director advised that government, not that the representation of Italian citizenship was incorrect or false, but merely that appellant claims statelessness.

Even if appellee properly advised that appellant is in fact stateless, it would not moot the issue herein. The discontinuance of illegal conduct does not render a case moot. *United States v. W. T. Grant Co.*, 345 U.S. 629 (1923).

Stark v. Wickard, 321 U.S. 288 (1944), acknowledged that injunctive relief was appropriate to restrain an executive order fixing milk rates. The Court said:

“* * * the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternate remedy will enable petitioners to maintain their suit. * * *”

Columbia Broadcasting System v. United States, 316 U.S. 407 (1942), held that Federal Communications Commission's Regulations alleged to be improper, constituted a sufficient threat of cancellation of petitioner's contracts and therefore sufficient irreparable injury for injunctive relief. See also: *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In litigation to prevent enforcement of illegal orders of cabinet officers it was held appropriate to grant injunctive relief in *Work v. Louisiana*, 269 U.S. 250, 254 (1925), and *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

Here, appellant complains of an illegal citizenship ruling by delegates of the Attorney General. Upon the basis of the failure to truly inform the United Kingdom that appellant is in fact stateless, a refusal has been secured from that country, permitting deportation to Italy. In addition, appellant requires settlement of his statelessness claim so that he may properly designate his citizenship in immigration forms under 8 U.S.C. 1305 and 8 U.S.C. 1252(e). If he is in fact stateless, appellee should not be permitted to illegally advise others that appellant is a citizen of Italy or that he merely claims statelessness.

The decision of March 20, 1967, of the Italian Court holding that appellant has lost his Italian citizenship likewise does not moot the merits herein. It is not a ruling on statelessness but merely on loss of Italian citizenship. It does not have injunctive effect upon appellee who was not a party thereto. A foreign judicial decree not formally introduced in evidence herein and rendered subsequent to the initiating of the present litigation does not automatically moot this litigation or preclude judicial inquiry into the facts disputed by the parties. Proper evaluation of this foreign decree requires a remand of the cause to the District Court so that it might be introduced in evidence and considered.

CONCLUSION

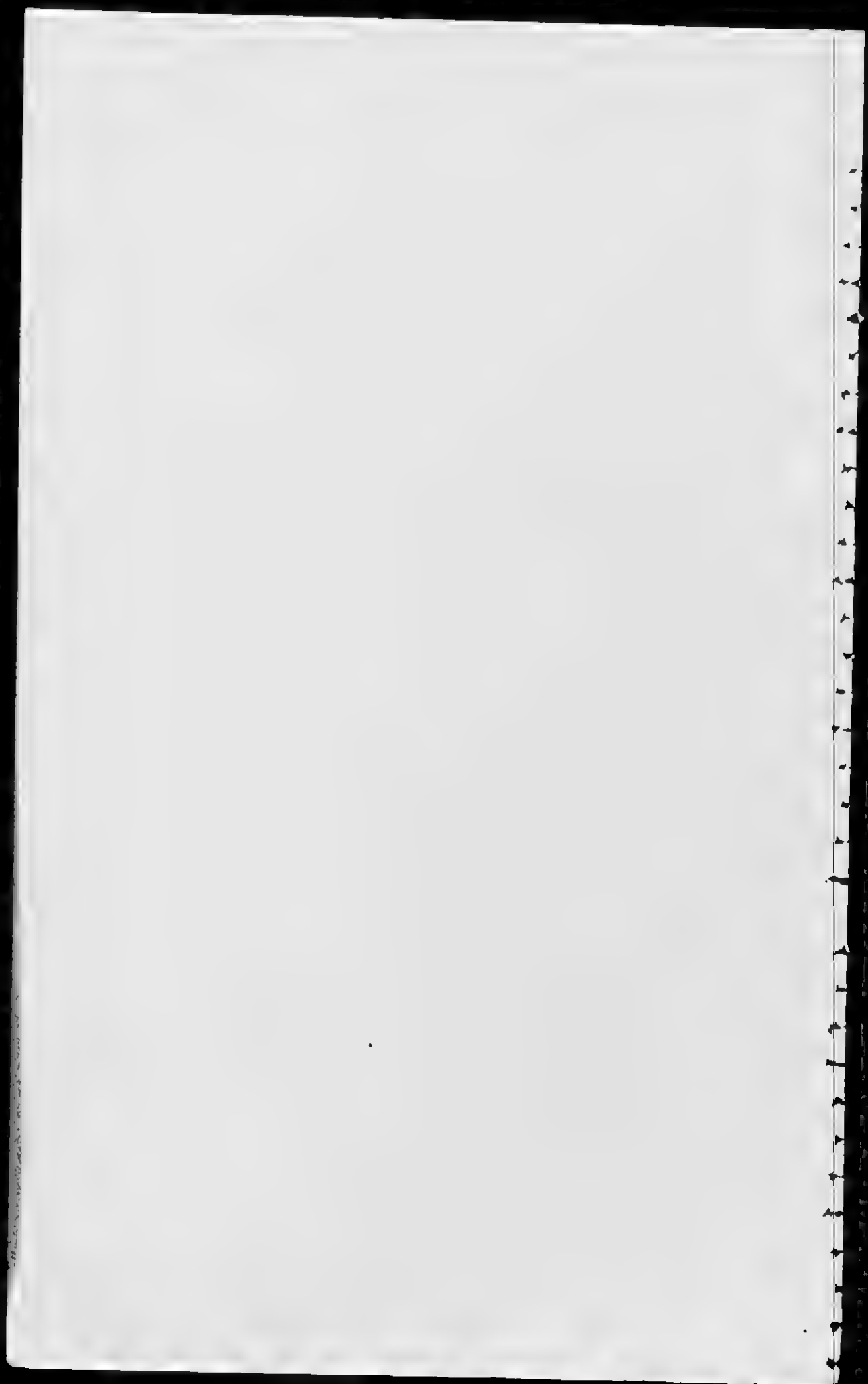
The judgment below should be reversed.

Respectfully submitted,

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Attorneys for Appellant



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,030

PAUL DE LUCIA,
APPELLANT,

v.

ATTORNEY GENERAL OF THE UNITED STATES,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM

In Cheng Fan Kwok and Chan Kwan Chung v. Immigration and
Naturalization Service, 381 F.2d 542 (C.A.3, 1967), the United States
Court of Appeals for the Third Circuit found itself without jurisdic-
tion to review the denial of a stay of deportation sought in order to

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 18 1968

Nathan J. Paulson
Clerk

enable the petitioners to apply for adjustment of status which would enable them to remain in the United States. The Court agreed with the Second Circuit's Tai Mui decision, cited in appellant's briefs, which found that the district court had jurisdiction to review a similar determination and that direct review in a United States Court of Appeals under section 106 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a, was inappropriate. Petitioners then applied for certiorari, in which the Government joined, and certiorari was granted by the Supreme Court on December 11, 1967 in the Chung case. 36 L.W. 3242.

Another recent decision is Yamada v. Immigration and Naturalization Service, decided by the United States Court of Appeals for the Ninth Circuit, October 17, 1967, and as yet unreported. There direct review in the United States Court of Appeals under Section 106 challenged the denial of a visa petition, which if granted would have vitiated the deportation order. The Court found jurisdiction lacking and thus agreed with the restrictive reading of the Second and Third Circuits. The 90 day period allotted for a petition for certiorari has not expired and no petition for certiorari has as yet been filed. It is our belief that if a petition for certiorari is filed the Government will support it.

Of interest also is Li Cheung v. Esperdy, 377 F.2d 819 (C.A. 2, 1967) in which the Second Circuit adhered to its prior decision in

Tai Mui that jurisdiction to review the denial of a stay of deportation resided in the district court. However, the Court stated (at p. 820):

From a history of these and similar petitions it becomes apparent that their purpose is to secure delay of deportations by means of fruitless jurisdictional disputes. Therefore, in order to effectuate the congressional intent of expedition as evinced by Section 1105a(a), we have concluded to examine the merits of the petitions to obviate any further delay in the event that we are in error.

Finding no merit in the petition the Court upheld the District Director's order denying a stay of deportation.

The foregoing decisions are cited in order to apprise the Court of current developments. They support the assertion in our brief that the various courts of appeals are divided in appraising the span of the exclusive review procedure prescribed by section 106. However, the Government's position in those cases and in other cases supports the more generous construction of the statute as encompassing all determinations affecting the deportation order. But we point out that the courts are divided only in regard to determinations extrinsic to the deportation proceeding which may enable the alien to expunge the deportation order. No court has ruled or suggested that determinations relating to the execution of the deportation order itself are not part of the "final orders of deportation" of

which section 106(a) speaks. We believe that such determinations are clearly within the exclusive judicial review procedure prescribed by section 106(a).

It seems to us that the closest analogy is offered by Rose v. Woolwine, 344 F.2d 993 (C.A.4, 1965). There petition challenged the refusal to reopen a deportation proceeding to give her an opportunity to impeach evidence not relevant to her deportability but affecting her readmission to the United States. The Court entertained the petition as relating to the execution of the deportation order and found that the issue on which petition sought to present evidence did

pertain to deportability for it involves the special consequences that will follow from the deportation . . . We read "deportability" to include matters affecting the severity of a deportation . . . The Act, as we have seen, recognizes that more may be at issue in a deportation hearing than the bare question of deportability.
(p.p. 995, 996)

Respectfully submitted,

David G. Bress, United States Attorney

Frank Q. Nebeker, Assistant United
States Attorney

OF COUNSEL:

Charles Gordon, General Counsel
Immigration and Naturalization Service

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion
has been mailed to counsel for appellant, Charles Gordon,
Esquire, General Counsel, Immigration and Naturalization Service,
119 D Street, N.E., Washington, D. C. 20002, this 3th day of
~~January~~ ~~1968~~

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

